SAVITHRI VELLO v. EVERSENDAI CONSTRUCTIONS (M) SDN BHD & ANOR

HIGH COURT MALAYA, IPOH
SU TIANG JOO JC
[JUDICIAL REVIEW NO: AA-25-18-09-2020]
14 DECEMBER 2021

Abstract – *The legal burden to prove that the workman is not gainfully employed lay on the workman himself as this would be a fact that is within his knowledge. Once the workman testifies that he is not gainfully employed post-dismissal, the evidential burden to prove otherwise shifts to the employer.*

ADMINISTRATIVE LAW: *Judicial review – Application for – Judicial review against award by Industrial Court – Constructive dismissal – Industrial Court ordered applicant be paid back wages – Compensation for backwages deducted by 70% – Factors taken into account – Exercise of discretion in making deductions for post-dismissal earnings*

INDUSTRIAL COURT: *Dismissal – Award – Application for judicial review against award by Industrial Court – Whether workman gainfully employed after dismissal – Legal and evidential burden of proof – Whether burden laid upon workman or employer to prove workman was gainfully employed after dismissal*

This was an application for judicial review against an Industrial Court award. The applicant had succeeded in her claim for constructive dismissal at the Industrial Court, against the first respondent. Having found that the departure of the applicant was anything but cordial, the Industrial Court did not order that she be reinstated. The Industrial Court instead ordered that the applicant be paid backwages. After scaling down the compensation in the form of backwages by 70%, plus an award of one month's salary by way of compensation for each (completed) year of service and after deducting the amount of RM25,800 paid to her under the mutual separation scheme, the first respondent was ordered by the Industrial Court to pay the applicant a total sum of RM29,960. In substance, in this judicial review application, the applicant complained that the Industrial Court had committed an error in deducting the compensation for backwages by 70% by holding that she failed to prove that she was not gainfully employed after the termination of her services. The issue that arose was whether the burden laid upon the applicant or the first respondent to prove that the applicant was gainfully employed after her dismissal.

Held (granting order to quash part of Industrial Court's award):

(1) The Industrial Court Chairman committed an error of law by failing to hold that, with the applicant having testified that she was unemployed since her termination, the evidential burden of proof to rebut this piece

of evidence shifted to the first respondent to prove that she was, in fact, gainfully employed. Unless there was evidence led in rebuttal by the first respondent, the Industrial Court Chairman ought to have accepted the testimony of the applicant. (paras 13 & 14)

(2) The legal burden to prove that the workman was not gainfully employed lay on the workman as this would be a fact that was especially within his/her knowledge. However, once the workman, in this case the applicant, testified that she was not gainfully employed post the dismissal, the evidential burden to prove otherwise shifted to the first respondent. The first respondent did not lead any evidence to discharge this burden so as to rebut this piece of evidence. In fact, the applicant's testimony about her being unemployed was not even challenged by way of cross-examination. By failing to avail itself of the opportunity to put such a challenge to the applicant during cross-examination, it must be deemed that the applicant's testimony that she was unemployed post her dismissal could not be disputed. (paras 23, 24, 26, 27 & 28)

(3) Post-dismissal earnings is one of the factors to be taken into account when the court cogitates in the decision-making process and taking into account does not necessarily mean a deduction must be made after it has been taken into account. No reason was given as to why a deduction of up to 70% was made by the Industrial Court Chairman. The decision of the Industrial Court Chairman to deduct 70% of the compensation for backwages ought to be quashed. (paras 32-34)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor [2001] 3 CLJ 541 FC ***(refd)***

Ng Kim Fong v. Menang Corporation (M) Bhd [2020] 1 LNS 1263 CA ***(refd)***

Pembangunan Tanah Dan Perumahan Sdn Bhd v. Raja Qahaarruddin Raja Abdul Aziz [2020] 2 CLJ 519 CA ***(refd)***

Perbadanan Pengurusan Trellises & Ors v. Datuk Bandar Kuala Lumpur & Ors [2021] 2 CLJ 808 CA ***(refd)***

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629; [2010] 4 ILR 475 FC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Syed Abdul Rahman Tuan Kuning v. CIMB Bank Berhad & Anor [2021] 1 LNS 247 HC ***(refd)***

Tai Chin Yee v. Tong San Chan Distributors Sdn Bhd & Anor [2021] 1 LNS 543 HC ***(refd)***

UMW Toyota Motor Sdn Bhd & Anor v. Allan Chong Teck Khin & Anor [2021] 5 CLJ 193 CA ***(refd)***

V Paul Raj Chelladurai v. Jabatan Telekom Malaysia Bhd & Ors [2000] 4 CLJ 882 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 44, 59, 106, 134
Industrial Relations Act 1967, s. 20(3), Second Schedule para 3
Penal Code, s. 193
Rules of Court 2012, O. 53 r. 3(2)

For the applicant - Balakrishna Balaravi Pillai; M/s Krish Mano & Assocs
For the respondents - Guna Segaran Suppiah & Nanda Kumar Suppiah; M/s A M Ong & Partners

Reported by Lina E

JUDGMENT

Su Tiang Joo JC:

Introduction

[1] In the application for judicial review of an Industrial Court award, this High Court ("court") was tasked to determine whether the burden laid upon the workman or the former employer to prove that the workman was gainfully employed after his dismissal.

Industrial Court

[2] At the Industrial Court, the applicant succeeded in her claim that she was constructively dismissed by the first respondent without just cause and excuse (encl. 3 at para. [27] of the Industrial Court award ("IC award")).

[3] Having found that the departure of the applicant was anything but cordial, the Industrial Court did not order that she be reinstated into her former position.

[4] Instead, the Industrial Court *vide* its Award No. 820 of 2020 dated 15 June 2020 ordered that the applicant be paid backwages from the date of dismissal to the date of the award together with compensation *in lieu* of reinstatement (encl. 3 at para. [28] of the IC award).

[5] The computation of the monetary compensation awarded to the applicant is as follows:

(i)	Backwages: RM6,800 × 24 months (11.08.2017 to 11.06.2020)	= RM163,200
	Less: Scaling down by 70% (RM114,240)	
	Total	= RM48,960
(ii)	Compensation *in lieu* of reinstatement at one month's salary for each year of completed service (26.10.2015 to 10.08.2017) (RM6,800 × 1 month)	= RM6,800
	Total	= RM55,760
(iii)	Less payment made under the Mutual Separation Scheme	= RM25,800
(iv)	Final total	= RM29,960

[6] It is clear from the IC award (encl. 3 at para. [32]) that after scaling down the compensation in the form of backwages by 70%, plus an award of one month's salary by way of compensation for each (completed) year of service and after deducting the amount of RM25,800 paid to her under the mutual separation scheme, the first respondent was ordered by the Industrial Court to pay the applicant a total sum of RM29,960.

Judicial Review At The High Court

Leave

[7] On 9 March 2021, I had granted leave to the applicant to apply for judicial review and to, *inter alia*, seek an order of *certiorari* to quash the part of the IC award which had ordered the compensation in the form of backwages to be scaled down by 70% together with a deduction of RM25,800 for the payment made under the mutual separation scheme.

Review For Substance

[8] The Federal Court in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 4 ILR 475; [2010] 6 MLJ 1, which followed the earlier Federal Court case of *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 has made it clear that in a judicial review application, the High Court may review the decision-making process of the inferior tribunal, such as the Industrial Court, on grounds of illegality, irrationality and proportionality, which permit the courts to scrutinise the decision not only for process but also for substance.

Employment Post-dismissal – Burden Of Proof

[9] In substance, the applicant complains that the Industrial Court Chairman had committed an error in deducting the compensation for back wages by 70% based on the reason that she had failed to prove that she was not gainfully employed after the termination of her services.

[10] The applicant, in her evidence in the Industrial Court, had testified that after the termination of her services, she was not gainfully employed.

[11] However, the Industrial Court in para. [31] of the IC award held:

> ... apart from the Claimant making a statement that she was unemployed since her termination, no evidence was proffered.

[12] The Industrial Court proceeded further to order that the backwages otherwise payable to the applicant be deducted by 70%. There was no reason given for the deduction of 70%.

[13] With respect, in my view, the learned Industrial Court Chairman committed an error of law by failing to hold that with the applicant having testified that she was unemployed since her termination, the evidential burden of proof to rebut this piece of evidence shifted to the first respondent to prove that she was, in fact, gainfully employed.

[14] Unless there is evidence led in rebuttal, which may take a variety of forms (infra), by the first respondent, the learned Industrial Court Chairman ought to have accepted the testimony of the applicant. This is because ss. 59 and 134 of the Evidence Act 1950 expressly provide that all facts, except the contents of documents, may be proved by oral evidence and no particular number of witnesses shall in any case be required for the proof of any fact.

[15] The applicant would have taken the oath to tell the truth, the whole truth and nothing but the truth prior to giving her testimony in the Industrial Court. It is provided in s. 193 of the Penal Code, that:

> Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

[16] It is clear that the consequences of giving a false statement in a judicial proceeding such as in the Industrial Court are severe.

[17] Besides, a judgment premised upon any material falsehood or fraud may be liable to be impeached, see s. 44 of the Evidence Act 1950 which is reproduced hereunder:

> Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion.

[18] On impeaching a judgment on the ground of fraud, see the recent grounds of judgment contained in the case of *Syed Abdul Rahman Tuan Kuning v. CIMB Bank Berhad & Anor* [2021] 1 LNS 247, where Her Ladyship, Liza Chan Sow Keng JC held that seeking to impeach a judgment on the ground that it was obtained by fraud or collusion is a cause of action recognised by the law. However, the party seeking to impeach the judgment have to be careful that if he could have appealed, he does so and any impeachment action be filed timeously, see *Pembangunan Tanah Dan Perumahan Sdn Bhd v. Raja Qahaarruddin Raja Abdul Aziz* [2020] 2 CLJ 519 (CA).

[19] Thus, if there is no evidence led in rebuttal by the first respondent, the learned Industrial Court Chairman ought to have accepted the testimony of the applicant when she testified that:

(i) she had been unemployed since she considered herself as having been (constructively) dismissed on 11 August 2017;

(ii) her marriage suffered by reason of the termination of her employment;

(iii) she went through the post-natal period without any income or support; and had given birth to her firstborn as a single mother without any pay or financial help (encl. 3 pdf p. 122 of 137).

[20] As for the submissions by learned counsel for the first respondent that the applicant ought to have proved that she was not gainfully employed by tendering evidence of records of her contributions to the Employment Provident Fund ("EPF"), the Social Security Organisation ("SOCSO") and personal income tax returns to show that she was not gainfully employed, the answer is that, the first respondent could have subpoenaed for such evidence if it so wished but it did not.

[21] The Federal Court in *Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor* [2001] 3 CLJ 541 at p. 545 held that:

> ... it is in line with equity and good conscience that the Industrial Court, in assessing quantum of backwages, should take into account the fact, **if established by evidence or admitted**, that the workman has been gainfully employed elsewhere after his dismissal. Failure to do so constitutes a jurisdictional error of law.
>
> (emphasis added)

[22] The requirement to consider post-dismissal earnings is specifically provided in the Second Schedule of the Industrial Relations Act 1967 (Act 177) and in particular sub-s. 20(3) read together with para. 3 of the Second Schedule, which provides as follows:

> Where there is post-dismissal earnings, a percentage of such earnings, to be decided by the Court, shall be deducted from the backwages given.

[23] In my view, the legal burden to prove that the workman was not gainfully employed lay on the workman as this would be a fact that would be especially within her knowledge, see s. 106 of the Evidence Act 1950 which is reproduced hereunder:

> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

[24] However, once the workman, who in this case, is the applicant has testified that she is not gainfully employed post the dismissal, the evidential burden to prove otherwise shifts to the first respondent.

[25] With respect, to my mind, it is because the evidential burden of proof may shift during the course of a trial that the Federal Court in *Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor* (*supra*) in its wisdom did not lay down as to who has to produce the evidence and instead left it to be determined on a case-by-case basis. In *UMW Toyota Motor Sdn Bhd & Anor v. Allan Chong Teck Khin & Anor* [2021] 5 CLJ 193 (CA), a particularly relevant excerpt for this principle is set out at para. [63], where Her Ladyship, Supang Lian JCA said:

In *Keruntum Sdn Bhd v. The Director Of Forests & Ors* [2017] 4 CLJ 676 at p. 698, Hasan Lah FCJ (speaking for the Federal Court) said:

> [78] It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies, has discharged it, then the evidential burden shifts to the other party ... When the burden shifts to the other party, it can be discharged by cross- examination of witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of these different methods. See *Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd* [1998] 1 CLJ Supp 147; [1998] 1 MLJ 697.

[26] In the instant case, at the risk of repetition, as the applicant had testified that she has been unemployed since she was (constructively) dismissed, the evidential burden shifted to the first respondent to prove otherwise. From the notes of evidence, the first respondent did not lead any evidence to discharge this burden so as to rebut this piece of evidence.

[27] In fact, as asserted by learned counsel for the applicant, the applicant's testimony about her being unemployed was not even challenged by way of cross-examination.

[28] By failing to avail itself of the opportunity to put such a challenge to the applicant during cross-examination, it must be deemed that the applicant's testimony that she was unemployed post her dismissal could not be disputed, see *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639 (CA).

[29] With respect, the learned Industrial Court committed an error of law by holding that the applicant proffered no evidence when in fact, she had.

[30] Instead, it was the first respondent who had not discharged the evidential burden of proving otherwise by obtaining an admission or destroying the credibility of the applicant by way of cross-examination, or by leading evidence in rebuttal.

[31] In *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 CLJ 748 (CA), Gopal Sri Ram JCA (as His Lordship then was) held as follows:

> [6] An inferior tribunal or other decision making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law and it is no longer of concern whether the error is jurisdictional or not ...

[32] In the circumstances, in my view, the decision of the learned Industrial Court Chairman to deduct 70% of the compensation for backwages ought to be quashed and I so ordered.

Quantum Of Deduction

[33] Although part of the IC award which ordered the deduction by 70% of the compensation by way of backwages was quashed on the ground that the applicant was not gainfully employed post-dismissal based on evidence proffered, there is a further issue to be addressed namely, the quantum that ought to be deducted even if the applicant had obtained employment post-dismissal.

[34] With respect, as alluded to earlier, no reason was given as to why a deduction of up to 70% was made by the learned Industrial Court Chairman.

[35] In *Tai Chin Yee v. Tong San Chan Distributors Sdn Bhd & Anor* [2021] 1 LNS 543; [2021] 3 ILR 29, this court cited the following excerpt from the judgment of His Lordship, Steve Shim CJSS in *Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor* (*supra*):

> [50] ... In our view, it is in line with equity and good conscience that the Industrial Court, in assessing quantum of backwages, should take into account the fact, if established by evidence or admitted, that the workman has been gainfully employed elsewhere after his dismissal. Failure to do so constitutes a jurisdictional error of law. *Certiorari* will therefore lie to rectify it. *Of course, taking into account of such employment after dismissal does not necessarily mean that the Industrial Court has to conduct a mathematical exercise in deduction. What is important is that the Industrial Court, in the exercise of its discretion in assessing the quantum of backwages, should take into account all relevant matters including the fact, where it exists, that the workman has been gainfully employed elsewhere after his dismissal. This discretion is in the nature of a decision-making process. As such, it is subject to judicial review*.
>
> (emphasis added)

His Lordship, Steve Shim CJSS further stated, in *Dr James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd (Sabah) & Anor* (*supra*) at p. 544:

> ... That discretion is, however, not unfettered. It has to be exercised according to law. In this connection, s. 30(5) of the Industrial Relations Act 1967, is significant, and it reads:
>
> > The court shall act according to equity, good conscience and the substantial merit of the case without regard to technicalities and legal form.

[36] It is, therefore, clear that post-dismissal earnings is only one of the factors to be taken into account when the court cogitates in the decision-making process. It does not necessarily mean a deduction must be made after it has been taken into account.

[37] In *Tai Chin Yee v. Tong San Chan Distributors Sdn Bhd & Anor* (*supra*), this court at paras. [48] to [51] held that any post-dismissal earnings by the applicant need not be taken into account to reduce the monetary

compensation to show the court's abhorrence after making a finding premised upon a belated admission made during the judicial review hearing in the High Court, that the applicant was dismissed on trumped up charges of having forged cheques.

[38] After reviewing the affidavit (encl. 3), the notes of evidence (encl. 15, exh. SVL-1) and the IC award (encl. 3 at para [25]), this court is of the view that the finding of the learned Industrial Court Chairman based on the events leading to the applicant's termination of employment was quite disturbing. This is supported by the following facts:

(i) the applicant's concern about being transferred to a site with radiation issues when she had a troubled pregnancy and had earlier suffered a miscarriage, was not taken into consideration;

(ii) the need for the applicant to go for check-ups by reason of her troubled pregnancy was construed by the first respondent as her taking too much leave;

(iii) the mental anguish suffered by the applicant after being subjected to humiliation and was told that she was of no use to the department where she worked;

(iv) the applicant being subjected to extensive cross-examination concerning her marital problems which arose after having been constructively dismissed; and

(v) the extreme financial hardship suffered by the applicant after the dismissal.

[39] However, despite the above facts, no reason was given by the learned Industrial Court as to why a deduction of 70% was made.

[40] In *Perbadanan Pengurusan Trellises & Ors v. Datuk Bandar Kuala Lumpur & Ors* [2021] 2 CLJ 808 at p. 850 (CA), Her Ladyship Mary Lim JCA (now FCJ) had this to say:

> [121] ... We find support for this in *R v. Westminster City Council ex p Ermakov* [1996] 2 All ER 302 where the English Court of Appeal held that "reasons should be given at the same time as the decision was communicated, it followed that if no reasons or wholly deficient reasons were given, an applicant for judicial review was *prima facie* entitled to have the decision quashed as unlawful, whether or not he could show that he had suffered any prejudice thereby." The timing is material for the recipient of the decision to make an informed decision as to the next course of action or conduct.

[41] In the circumstances, with there being no evidence of any post-dismissal earnings and with the trauma that the applicant was subjected to, this court would not have made any deductions, in any event.

Mutual Separation Scheme

[42] We now come to the assertion made by the learned counsel for the applicant that firstly, the amount paid to the applicant under the mutual separation scheme ("MSS") should not be deducted and secondly, if it was to be deducted the amount ought to be RM20,900.

[43] The first contention is without merits because the payment was made to the applicant arising from her loss of employment. If it is not deducted from her compensation for backwages, it would mean that there will be double recovery for the amount paid to her under this scheme.

[44] As for the assertion that the amount paid to her was in fact RM20,900 and not RM25,800, I agree with the submission made by the learned counsel for the first respondent that the quantum was a finding of fact made by the learned Industrial Court Chairman and I ought not to disturb such a finding. It was further submitted by learned counsel for the first respondent that the applicant if armed with the relevant evidence can still approach the Industrial Court to have this varied if she is so minded.

Contractual Notice Of Termination

[45] During the course of submissions, the applicant through her counsel sought for an order that she ought to be paid a sum equivalent to two months' salary because a two months' notice ought to be given under her contract of employment for any termination.

[46] However, I observed that such grounds of complaint and relief sought were not set out in both the notice of application for judicial review (encl. 1) and the statutory statement filed pursuant to O. 53 r. 3(2) of the Rules of Court 2012. In the circumstances, these cannot be entertained, see *V Paul Raj Chelladurai v. Jabatan Telekom Malaysia Bhd & Ors* [2000] 4 CLJ 882; [2000] 2 AMR 2435; [2000] 3 MLJ 652 (CA).

[47] In any event, such grounds and relief sought would be considered a breach of contract. Thus, if the applicant had resorted to her contractual remedy, she ought to have sued in civil courts. If she had succeeded, if at all, bearing in mind she was paid a sum under the MSS, all she would have obtained would have been the two months' salary without any compensation for backwages, see *Ng Kim Fong v. Menang Corporation (M) Berhad* [2020] 1 LNS 1263 (CA), where His Lordship S Nantha Balan JCA at para. [168] said:

> In so far as quantum is concerned, we are mindful of the common law's stricture as to the amount of damages that is permissible for loss of employment. At the outset, we are constrained to state that we do not disagree with the proposition that was lucidly enunciated by HRH Raja Azlan Shah CJ (Malaya) in *Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors* [1980] 1 LNS 156; [1981] 1 MLJ 238 FC (p. 239), where he said:

> In the case of a claim for wrongful dismissal, a workman may bring an action for damages at common law. This is the usual remedy for breach of contract, eg, a summary dismissal where the workman has not committed misconduct.
>
> *The rewards, however, are rather meagre because in practice the damages are limited to the pay which would have been earned by the workman had the proper period of notice been given.*
>
> *... Reinstatement, a statutorily recognized form of specific performance, has become a normal remedy and this coupled with a full refund of his wages could certainly far exceed the meagre damages normally granted at common law.*
>
> (emphasis added)

Relief

[48] As the relief granted is to quash only that part of the IC award granting the 70% deduction for compensation for backwages, in line with equity and good conscience, and guided by the authority of *R Rama Chandran v. Industrial Court of Malaysia & Anor* (*supra*), I find that there was no necessity to remit the matter back to the Industrial Court to re-assess the award. This is because all that is required would be a mere arithmetical exercise.

Conclusion

[49] Wherefore, I had granted an order to quash that part of the IC award which ordered a deduction of 70% of the compensation for backwages. After hearing parties on costs, I awarded costs of RM15,000 subject to allocatur to be paid by the first respondent to the applicant.